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The Warren Court and Living Constitutionalism

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Scholars and judges have described living constitutionalism as a theory with no substance—simply a substitute for the political whims of judges. While not disputing that politics and values play an important role in all interpretive theories, this Article argues that living constitutionalism provides a robust framework for understanding the Constitution and the role that values should play in constitutional interpretation. The Warren Court's application of living constitutionalism addressed two major and, perhaps, conflicting questions: (1) how do we include voices excluded during discussions at the country's founding to make the Constitution a legitimate dignity document that is more reflective of our current society; and (2) how do we understand the Court's role in protecting the rights of the minority from the majority, and how do these rights evolve with the times? This Article argues that the Warren Court operationalized living constitutionalist theory. An examination of Warren Court decisions uncovers patterns and themes that can be applied as an interpretive theory. Without this framework of living constitutionalism, many of the great societal victories of the Warren Court, such as desegregation, voting rights, criminal justice, and death penalty abolition for juveniles, may not have happened. Further, with a new administration looking to appoint judges with an interest in social justice, this paper can serve as a resource for new judges looking to adopt an alternative theory to originalism. Thus, this Article articulates a clear vision for how the Warren Court used living constitutionalism, explains why the Warren Court's approach was necessary, and suggests that this theory could be adopted as an alternative to originalism.

INTRODUCTION

Justice Antonin Scalia exuded intellect and personality. Addressing the University of Cincinnati,[1] Justice Scalia spoke about the interpretive theory of originalism—a constitutional theory that holds that constitutional meaning comes from the intent of the Founding Fathers, the original understanding of the people at the time of the founding, or the original construction of the Constitution.[2] This

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1 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 849 (1989).

2 *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 645 (2013); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U.L. REV. 751, 753 (2009); Scalia, *supra* note 1, at 851–52; *see, e.g.*, Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 261 (2019) ("The

speech was turned into an essay titled "*Originalism: The Lesser Evil*,"[3] but the essay was not conciliatory. Justice Scalia wrote with thunder, extolling the advantages of originalism while downplaying its flaws.[4] Despite his conviction, Justice Scalia's words carried with them a nonchalance that accompanies assured victory. For him, originalism was destined to win because "[y]ou can't beat somebody with nobody."[5] Justice Scalia asserted that "[i]f the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be."[6]

One can almost hear the shallow murmurs of agreement by the attendees, and if agreement cannot be heard, it can certainly be read. Professors Nelson Tebbe and Robert Tsai, writing in 2010, suggested that "[l]iving constitutionalism is difficult to define; it is often described simply in opposition to originalism."[7] Professors Martin H. Redish and Matthew B. Arnould argue that continual affirmation—a form of living constitutionalism that this Article will refer to as contemporary ratification—is a theory that "amounts more to a result-oriented rhetorical device than a coherent theory of constitutional interpretation."[8] Justice Stephen Breyer, a living constitutionalist Justice,[9] wrote a book on interpretation called *Active Liberty*.[10] Professor James E. Ryan, discussing Justice Breyer's nonoriginalist interpretive theory, wrote that "[Justice Breyer's] approach seems quite abstract and at times only loosely connected to the text of the Constitution."[11] Recently, political scientist Calvin TerBeek proposed that living constitutionalism gained its dominance not because of a robust and persuasive intellectual theory but rather because it made progressive legal preferences "make constitutional sense."[12] TerBeek put this bluntly when he argued that "[d]uring the 1960s height of the Warren Court, living constitutionalists praised its major decisions, but the lack of a

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threshold question for all originalist methodologies concerns the original communicative content of the words of the Constitution.").

3 Scalia, *supra* note 1, at 849.

4 *See*, *e.g.*, *id.* at 852 ("But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing—either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court's desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support."); *id.* at 862–63.

5 *Id.* at 855.

6 *Id.*

7 Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 514 n.240 (2010).

8 Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1517 (2012).

9 *See* Andrea Seabrook, *Justices Get Candid About the Constitution*, NPR (Oct. 9, 2011, 12:58 AM), https://www.npr.org/2011/10/09/141188564/a-matter-of-interpretation-justices-open-up.

10 STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

11 James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1654 (2006) (book review).

12 Calvin TerBeek, *The Search for an Anchor: Living Constitutionalism from the Progressives to Trump*, 46 L. & SOC. INQUIRY 860, 884 (2021).

forward-looking blueprint left them open to creditable conservative charges that this theorizing was simply academic cover for politically desirable results."[13] To many politicians, scholars, and judges, living constitutionalism, the idea that the Constitution evolves with the values and contexts of contemporary society and the preeminent nonoriginalist theory, was a meaningless phrase—a cover for judicial intervention and lawmaking.[14] To cut through conceptual differences and focus on substance, Professor Lawrence B. Solum, an originalist, attempted to define living constitutionalism.[15] He discussed numerous variants and applications of both originalism and living constitutionalism.[16] Most of the living constitutionalist theory Solum discusses was put forth by professors or legislators.[17] The Warren Court was mentioned twice and its contribution to living constitutionalism not thoroughly explored.[18]

The Warren Court may be the preeminent example of a living constitutionalist Supreme Court in United States history.[19] The Warren Court did not invent the idea of reading the Constitution as a living document.[20] It did, however, operationalize it as a mode of interpretation with relative success. While there was no one approach that all the Justices would agree on, there are themes and structures the Court embraced when engaging in interpretive theory. These are themes of interpretation actively and consistently used during the Warren Court era, not simply academic justifications offered by legal progressives after the fact. Living constitutionalism should (1) interpret constitutional values and provisions, (2) apply these values and provisions to modern contexts and meanings, and (3) reflect a diverse America that was unable to take part in the founding project. Living constitutionalism is not a rigid theory that perfectly guides a judge to the one true answer. To suggest perfection would make living constitutionalism fall into the same mistake as originalism. No judge can be free of their values, and any theory purporting to interpret law completely objectively is hiding this key fact.[21]

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13 *Id.* at 861.

14 *See, e.g.*, J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHTS TO SELF-GOVERNANCE 19 (2012) ("Perhaps more than any other cosmic constitutional theory, living constitutionalism, both in theory and in practice, has elevated judicial hubris over humility, boldness over modesty, and intervention over restraint."); *see generally* Antonin Scalia, *Common Law Courts in a Civil Law System*, TANNER LECTURE ON HUMAN VALUES 46 (1995) (suggesting that living constitutionalism allows justices to decide for themselves, under no standard, when the Constitution evolves).

15 *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.L. REV. 1243, 1261 (2019).

16 *See id.*

17 *See id.* at 1260–61.

18 *See generally id.*

19 *See, e.g.*, Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8–9 (1993) (describing how the Warren Court "was the basis for" and "sprouted" the themes of living constitutionalism).

20 *See id.* at 6.

21 Living constitutionalists generally admit that the values of judges play an inevitable role in all interpretation; the real question concerns what those values are and what is the appropriate level of

The work living constitutionalism does is not proscriptive: conservative and progressives justices alike could use the theory and come to two completely different answers. Rather, living constitutionalism works as a structure for approaching the law, understanding the Constitution as a dignity document, addressing the dead hand problem, and making our republic operate within the contemporary world it finds itself in. It is a theory that has been doing work in this regard for centuries.[22] This Article argues that an understanding of how the Warren Court utilized living constitutionalism will allow new judges and scholars to develop an alternative to originalism. Further, by examining how living constitutionalism works, we begin to understand how necessary living constitutionalism is and how without it the Court would have struggled to recognize some of the fundamental rights that it did. The Warren Court was the Court of *Brown v. Board of Education*,[23] the sit-in cases,[24] "one person, one vote,"[25] and criminal justice.[26] And even in areas where the Court played a complimentary role, the Court encouraged other institutions to expand rights.[27]

I. THE INTERPRETIVE BEGINNING: THE WARREN COURT AND *BROWN*

Segregation and the movement to eliminate it defined the Warren Court. While the Thirteenth Amendment ended the wide practice of slavery, racial segregation persisted in schools, public facilities, restaurants, shops, buses, and other facets of society.[28] The separate but equal doctrine—found permissible by the Supreme Court in *Plessy v. Ferguson*[29]—inherently and systematically discriminated against Black people. Potential federal legislative fixes were complicated: in the *Civil Rights Cases* decided in the late nineteenth century, federal attempts to regulate discriminatory practices of private organizations were

judicial review. *See generally* Eric J. Segall, *The Concession That Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33 (2020) (analyzing the role value judgments play in both living constitutionalism and originalism). For an analysis on implicit judicial biases; see generally Catie Wheatley, *Honesty is the Best Policy: Addressing Implicit Bias in the Judiciary*, 9 IND. J.L. & SOC. EQUAL. 94 (2021).

22 *See*, *e.g.*, TerBeek, *supra* note 12, at 860–63 (describing the history of living constitutionalism); McCulloch v. Maryland, 17 U.S. 316, 415 (1819) ("This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.").

23 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24 McKenzie Webster, *The Warren Court's Struggle With the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations*, 17 J.L. & POL. 373, 373–76, 406–07 (2001).

25 Reynolds v. Sims, 377 U.S. 533, 558 (1963).

26 *See* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

27 *See, e.g.*, WILKINSON, *supra* note 14, at 17.

28 *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 10 THE SUPREME COURT REV. 59, 62 –63 (2010).

29 Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

cast aside as unconstitutional.[30] During the mid-twentieth century, there was little appetite in Congress to redress any form of segregation.[31] Southern senators were able to block most civil rights legislation and continued to be reelected because of their opposition.[32] As for the states, many of them were even more racist. The segregation laws themselves had been passed by the states as part of a larger strategy to uphold white supremacy.[33] Southern states continued to hold separate but equal as fundamental constitutional law. When a Kansas resident, Oliver Brown, attempted to enroll his child in a white school but was rejected because of segregation, the case, along with other similar cases that were consolidated with *Brown*, made its way to the U.S. Supreme Court.[34] The question before the Court concerned challenging long-standing Court precedent and even longer-standing cultural rage.[35]

Justice Felix Frankfurter was rarely of two minds. Born in Vienna, Austria, to Jewish parents, Justice Frankfurter arrived in the United States in 1894 at the age of twelve.[36] He received top grades from Harvard Law School and was a member of the *Harvard Law Review*.[37] He became politically involved and advocated for labor rights, civil liberties, and the Zionist movement of the early twentieth century.[38] Justice Frankfurter helped start the American Civil Liberties Union (ACLU) and held all the general bona fides and beliefs attributable to most

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30 *See* Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883* Civil Rights Cases, 70 CHI.-KENT L. REV. 1123, 1126 (1995). The *Civil Rights Cases* consisted of five cases that looked to challenge the Civil Rights Act of 1875. These five cases were consolidated for Supreme Court argument. United States v. Stanley (The Civil Rights Cases), 109 U.S. 3 (1883).

31 *See* Anthony Badger, *The South Confronts the Court: The Southern Manifesto of 1956*, 20 J. POL'Y HIST. 126, 138 (2008); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 366–67 (2007)

> Without *Brown*, Congress most likely would not have enacted civil rights legislation when it did. No such bill had been passed since 1875, and since the 1920s many proposed measures had succumbed to the threat or reality of Senate filibuster. After *Brown* raised the salience of race, many northerners—white and black—demanded civil rights legislation. Liberals in both parties endorsed the concept as the 1956 elections approached.

32 *See, e.g.*, KEITH M. FINLEY, DELAYING THE DREAM: SOUTHERN SENATORS AND THE FIGHT AGAINST CIVIL RIGHTS, 126 (2008); Ira Katznelson, Kim Geiger, & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI, Q. 283, 285 (1993) ("Liberal initiatives, in short, could not pass without southern congressional support."). *See generally* EARL BLACK & MERLE BLACK, POLITICS AND SOCIETY IN THE SOUTH 201 (1987) (describing the political conditions in the South that lead to the reelection of segregationist senators).

33 *See, e.g.*, Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1337 (2006) ("[T]he California state legislature passed a law which prohibited racial minority groups from attending school with white children. A California newspaper printed an editorial piece supporting the segregation law, praising the law's ability to 'keep our public schools free from the intrusion of the inferior races.'" (citations omitted)).

34 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

35 *See id.* at 488.

36 *See* Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDIS. L.J. 809, 819–821 (1994).

37 *See* James R. Belpedio, *Felix Frankfurter*, FIRST AM. ENCYCLOPEDIA (2009) https://www.mtsu.edu/first-amendment/article/1330/felix-frankfurter.

38 *See* Benjamin Akzin, *Felix Frankfurter—In Memoriam*, 2 ISR. L. REV. 299, 300–01 (1967).

liberals growing up in the New Deal Era.[39] In the courtroom, Justice Frankfurter advocated for judicial restraint—the idea that judges should leave most issues to the legislature and decide the cases they do take narrowly.[40] Liberals from the *Lochner* and New Deal eras, like Justice Frankfurter, could easily recall the aggressively conservative Supreme Court striking down liberal legislation and believed such overreach was antidemocratic.[41]

Once he was on the Supreme Court, Justice Frankfurter was quick to talk—occasionally condescendingly—about the law to colleagues. There are many examples of Justice Frankfurter "terribly misread[ing]" situations with other justices.[42] Justice Frankfurter once told fellow Justice Stanley Reed that he had taught Harvard Law School students to read statutes multiple times and that Reed should follow that advice as well.[43] To some, Justice Frankfurter had an incredible mind with a unique appreciation for government and liberty.[44] To others, he was always seconds away from tripping into a lecture: the cloakroom was his classroom, and the annoyed Justices were his students.[45]

Yet, as Justice Frankfurter mulled over the case of *Brown*, the great minds of the Court did not know what to think.[46] The old liberal training required the Court to move slowly and with Congress. *Brown* was a potentially unparalleled move by the Court where it would mandate broad and sweeping social change, far ahead of the legislature.[47] Justice Frankfurter himself was a supporter of civil rights.[48] His personal views on race and rights were ahead of his time, and he was a supporter of desegregation.[49] However, Justice Frankfurter was an avid institutionalist.[50] He cared deeply about the Court and wished to preserve its legitimacy. He had judicial

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39 *See* John Fox, *Biographies of the Robes*, THIRTEEN (PBS affiliate) https://www.thirteen.org/wnet/supremecourt/rights/robes_frankfurter.html.

40 *See* Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting). Both liberals and conservatives have throughout history shifted between advocating for judicial restraint and supporting judicial review. *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 215 (2019).

41 *See* David A. Strauss, *Why Was Lochner Wrong?*, 70, UNIV. CHI. L. REV. 373, 373 (2003) (describing liberal policies that the Supreme Court struck down).

42 Melvin I. Urofsky, *William O. Douglas and Felix Frankfurter: Ideology and Personality on the Supreme Court***,** 24 HIST. TCHR. 7, 8 (1990).

43 *Id.* at 9.

44 *See* Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1799–1800 (1990) (describing the influence Frankfurter had in shaping judicial restraint on students).

45 *See* Urofsky, *supra* note 42, at 8.

46 *See* Letter from Felix Frankfurter, Just., U.S. Sup. Ct., to the Conference (May 23, 1953) (discussing possible questions to ask the lawyers, written just before the case was put to reargument).

47 Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1618–19 (2004).

48 *See id.* at 1615.

49 *See id* ("Justice Frankfurter abhorred racial segregation, and his personal behavior clearly demonstrated his egalitarian commitments.").

50 *See id.* at 68; Tom C. Clark, *My Brother Frankfurter*, 51 VA. L. REV. 549, 549–51 (1965); Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 947–48 (1990).

restraint on one hand, the soul of the country on the other, and no escape route to get the Court out of deciding the case.[51]

It is appropriate that Justice William O. Douglas began his autobiography by discussing Justice Frankfurter: their differences often defined the Warren Court.[52] In personality and judicial philosophy, Justices Douglas and Frankfurter were opposites.[53] Justice Douglas served on the Court from 1939 to 1975 and was the author of many Warren Court opinions.[54] As one scholar put it, Justice Douglas was a person "whom one would never nominate for a pleasing personality award."[55] Justice Douglas would get bored during Frankfurter's long cloakroom lectures and leave the table in favor of the sofa.[56] He would torment Justice Frankfurter by making little comments and digs incessantly.[57] The attacks were often personal, and they were examples of Justice Douglas's view that Justice Frankfurter had "deep inside him a feeling of inadequacy."[58] It is important to note that the rivalry was not one sided. Justice Frankfurter called Justice Douglas "evil,"[59] treated Justice Douglas as a simpleton or a political hack,[60] and lambasted Justice Douglas for his belief in an active judiciary.[61] Justice Douglas represented the new left: keen to seek progressive victories through litigation.[62] As much as Justice Frankfurter saw *Brown* as an impending threat to the Court's credibility, Justice Douglas saw it as an opportunity.

In 1952, Chief Justice Vinson led the Court as the justices heard oral argument in *Brown* for the first time.[63] Desegregation had four votes: Justices William Douglas, Hugo Black, Harold Burton, and Sherman Minton.[64] Segregation had three votes with Justices Stanley Reed, Tom Clark, and Chief Justice Vinson.[65] Justices Jackson and Frankfurter remained as swing votes, both frozen in place by

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51 *See* Felix Frankfurter, Unpublished Draft from the Frankfurter Papers (1954) ("[I]t is not our duty to express our personal attitudes toward these issues however deep our individual convictions may be. The opposite is true.").

52 *See* WILLIAM O. DOUGLAS, THE COURT YEARS 1937–1975, at 7–8 (1980).

53 *See* Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States*, 1988 DUKE L.J. 71, 113 (1988).

54 *See* Michael I. Sovern, *Mr. Justice Douglas*, 74 COLUM. L. REV. 342, 345–46 (1974).

55 Urofsky, *supra* note 42, at 9.

56 *Id.*

57 *See id.*

58 DOUGLAS, *supra* note 52, at 23.

59 Urofsky, *supra* note 42, at 9.

60 *See* H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 45, 128 (1981).

61 Urofsky, *supra* note 42, at 10.

62 > Justice Frankfurter and his followers continued to advance the idea of living constitutionalism as a theory of judicial restraint. Eventually, however, legal intellectuals allied with the New Deal/Civil Rights regime began to employ the idea of a living Constitution in a different way. Now living constitutionalism became an argument for active judicial protection of civil rights and civil liberties.
>
> *See* Balkin, *supra* note 40, at 246

63 *See* Klarman, *supra* note 47, at 1613.

64 *Id.*

65 *Id.*

a swirling cocktail of judicial norms, societal values, and personal beliefs.[66] It appeared that desegregation did not have the required five votes. Frankfurter wanted more time to build a consensus within the Court and was able to maneuver the case into reargument the next year.[67] A year made all the difference. In the intervening year, Chief Justice Vinson died of a heart attack, and Chief Justice Earl Warren was appointed to the Court.[68] The desegregation bloc had its fifth vote,[69] and the Warren Court was born.

While there were now five votes for desegregation, almost all the members of the Court wished for a unanimous decision.[70] With five votes came nine, although Justice Reed was briefly a holdout.[71] The matter of judicial interpretation, however, was less settled. Justice Frankfurter strived to unearth the intent and meaning of the Fourteenth Amendment.[72] Justice Douglas's conference notes show Justice Frankfurter suggested that legislation passed by Congress assumed that segregation was valid.[73] Justice Jackson wrote a memorandum that was a lackluster, almost embarrassed defense of *Brown*.[74] This prompted a response from one of his clerks who wrote candidly, "[i]f segregation is no longer legal, <u>of course</u> the country will not tolerate it -- that would be a much better tone in your opinion. . . . How can you expect them to be convinced if you are not yourself?"[75] Ultimately, Chief Justice Warren wrote the opinion of the unanimous Court and did so using living constitutionalism.[76]

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66 *See* William O. Douglas, Unpublished *Brown* Conference Notes (Dec. 13, 1952) (on file with Douglas Papers); Tom Clark, Unpublished *Brown* Conference Notes, (1952) (on file at Tarton Law Library, University of Texas, Box 27A); Klarman, *supra* note 47, at 1616.

67 *See* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1873, 1906 (1991); KLARMAN, *supra* note 31, at 67.

68 > In September of 1953, just before Brown was to be reargued, Vinson died of a heart attack, and everything changed… President Eisenhower replaced Vinson with Earl Warren…Through a combination of determination, compromise, charm, and intense work with the other justices… Warren engineered something that might have seemed impossible the year before: a unanimous opinion overruling Plessy. https://www.newyorker.com/magazine/2004/05/03/did-brown-matter.
>
> *See* Cass Sunstein, *Did Brown Matter?*, THE NEW YORKER (2004)

69 *See* Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954).

70 *See* Memorandum from William O. Douglas, Just., U.S. Sup. Ct. (May 17, 1954); Letter from Felix Frankfurter, Just., U.S. Sup. Ct., to Grenny Clark, Att'y (Apr. 15, 1957) (on file with author) (explaining that it was not Chief Justice Warren alone that created a unanimous Court).

71 *See* Tushnet & Lezin, *supra* note 67, at 1907.

72 *See* Letter from Alexander Bickel, L. Clerk, U.S. Sup. Ct., to Felix Frankfurter, Just., U.S. Sup. Ct. (Aug. 22, 1953) (on file with author); Klarman, *supra* note 47, at 1615; *cf.* Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 97 (2010) ("*Brown* vividly illustrates that history cannot always resolve the problems of today, and in fact, too literal a quest for past intentions may be counterproductive.").

73 *See* Douglas, *supra* note 70.

74 Memorandum from Robert H. Jackson, Just., U.S. Sup. Ct. (Mar. 15, 1954).

75 Letter from E. Barrett Prettyman Jr., L. Clerk, U.S. Sup. Ct., , to Robert H. Jackson, Just., U.S. Sup. Ct. (on file with Library of Congress Box 184) (emphasis in original).

76 *See* Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954); GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT 21–22 (2020).

The Court declared that it could not "turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[77] It continued by saying,"[w]e must consider public education in light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[78] In full transparency and with adequate vigor, the Court established that it was going to look at the context of American life, the place education has in the contemporary period, and modern understandings and values.[79]

Further, the Court reiterated that this approach is the *only* way to interpret the law on this issue.[80] The writers of the Fourteenth Amendment did not anticipate that they were banning segregation.[81] In fact, far from being a help to *Brown*, early forms of originalism were manifested with the purpose of defeating *Brown*.[82] We might expect an originalist Court to prioritize the intent of the Fourteenth Amendment writers over the dignity of education in modern society. Professor Frank B. Cross noted that "[v]arious commentators have agreed that originalism could not support the outcome, and there is a widespread belief that the decision was inconsistent with the original understanding of the Fourteenth Amendment."[83]

The Warren Court itself looked into the history of the Fourteenth Amendment and found it, in the nicest light, inconclusive. Living constitutionalism, however, is less bound by the specific intent of the writers and more persuaded by context, constitutional themes, and contemporary understandings. It is living constitutionalism that allows the *Brown* Court to assess the role race and education play in modern society.[84] Professor Morton J. Horwitz wrote on living constitutionalism and *Brown* that, "[o]ut of this seed in *Brown v. Board of Education* there sprouted, during the Warren Court's tenure, a very powerful view held among several of the Justices that constitutions cannot be static, but are designed to change."[85] Yet, while the Warren Court understood living constitutionalism as necessary, it was unclear how to operationalize and use it in a way that acknowledges subjectivity, judicial values, lived experiences, and judicial bias without reducing living constitutionalism to purely politics by another name.

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77 *Brown*, 347 U.S. at 492.

78 *Id.* at 492–93.

79 *See id.* at 493 ("Today, education is perhaps the most important function of state and local governments.").

80 *See id.*

81 *See* FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 92 (2013); Ronald Turner, *The Problematics of the* Brown*-is-Originalist Project*, 23 J. OF L. & POL'Y 591, 595 (2015).

82 *See* Calvin TerBeek,*"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 832 (2021) ("[T]he modern GOP's constitutional 'originalism' grew directly out of resistance to *Brown*.").

83 CROSS, *supra* note 81, at 92; *see also* GEOFFREY R. STONE & DAVID A. STRAUSS, *supra* note 76, at 21–22 ("The most important stumbling block was the strong evidence that when the Fourteenth Amendment was adopted in 1868, it was not understood—by its proponents or opponents or the public at large—to outlaw school segregation.").

84 *See* Brown, 347 U.S. at 492–93; *see also* WILKINSON, *supra* note 14, at 16.

85 Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8 (1993).

How and why does living constitutionalism allow the Court to look at education and modern society? *Brown* was a short opinion and did not expand vigorously on living constitutionalism. It would set the tone, however, for the entire Warren Court, both in legacy and substance.

And what of the balance between contemporary values and the Court's role as a counter-majoritarian force? Justice Douglas wrote a memo in 1960 reflecting on the *Brown* decision.[86] He recalled that Justice Frankfurter got heated in conference, saying that if Justice Douglas got his way, the segregation cases would have arrived at the Court too soon.[87] Justice Frankfurter could not have ruled against it because "public opinion had not then crystallized against it."[88] With Chief Justice Warren, Justice Frankfurter maintained that public opinion had since changed, and thus it was good that the Court had waited.[89] Justice Douglas quoted Justice Brennan as responding: "'God almighty.'"[90]

II. IT'S ALIVE! JUSTICE BRENNAN, LIVING CONSTITUTIONALISM, AND CONTEMPORARY RATIFICATION

Brown is instructive, as it demonstrates the beginning of living constitutionalism in the Warren Court; living constitutionalism was a burgeoning idea without full development. Justice William Brennan Jr.'s 1986 article, *The Constitution of the United States: Contemporary Ratification*,[91] provides a more comprehensive view of the Court's theory in retrospect. Earl Warren was the Chief Justice, but many have suggested the Court could have been named the Brennan Court.[92] Chief Justice Warren frequently assigned important opinions to Justice Brennan and considered him to be the "most capable lieutenant."[93] Justice Scalia, a Justice who is often compared with Justice Brennan in their respective roles,[94] said that Justice Brennan was "probably the most influential justice of the century."[95]

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86 Suggested citation: Memorandum from William O. Douglas, Douglass Papers Box 1149, Library of Congress (Jan. 20, 1960) (on file with author).

87 *Id.*

88 Memorandum from William O. Douglas, Just., U.S. Sup. Ct. (Jan. 20, 1960) (on file with Douglas Papers Box 1149, Library of Congress).

89 Klarman, *supra* note 47, at 1621).

90 Douglas, *supra* note 70.

91 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986) (internal quotations omitted).

92 *See, e.g.*, Daniel J. O'Hern, *Tribute to Justice William J. Brennan, Jr.*, 15 NOVA L. REV. 11, 11 (1991); Dawn Johnson, *Justice Brennan: Legacy of a Champion*, 111, MICH. L. REV. 1151, 1164 (2013).

93 *Id.*

94 *See, e.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 311–14 (1989); Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory–A Comment on* Burnham v. Superior Court, 22, RUTGERS L.J. 689, 690 – 91 (1991); Travis A Knobbe, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265, 1265–67 (2008).

95 *See* Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1157 (2013).

Appointed in 1956 by President Dwight D. Eisenhower,[96] Justice Brennan arrived at the Court with considerable import. Justice Brennan graduated from Wharton School of Business and Harvard Law School,[97] served in the military,[98] and eventually made his way to the New Jersey Supreme Court.[99] Once on the United States Supreme Court, he wasted little time in becoming the intellectual leader of the Court's progressive wing.

Justice Brennan advocated for an interpretive theory called contemporary ratification. In 1985, he looked back at his time on the Court and wrote a defense of his theory in his article on contemporary ratification.[100] His article not only highlighted his interpretive approach, but it also tied together numerous interpretive strategies used by the Warren Court.[101] Justice Brennan understood the Constitution as a document that is about dignity and the rights of all people.[102] He acknowledged that we have not lived up to this purpose in all ways, but wrote that "we are an aspiring people, a people with faith in progress."[103] It is with this understanding—that the Constitution is concerned with human dignity and progress—that Justice Brennan began his analysis.

The Constitution is vague; its text is "broad and the limitations of its provisions are not clearly marked,"[104] giving rise to the need for interpretation. This interpretation is not a private affair; interpretation cannot be a "haven for private moral reflection."[105] Rather, interpretation is "inescapably public."[106] By this, Justice Brennan meant that the interpretation of the Court is open to critical scrutiny and done in the public context. The Court resolves public controversies by interpreting a public text, often on public issues with surrounding controversy. Justice Brennan did not spend too much time expanding on the ramifications of this assertion.[107] His assertion likely suggests two things: (1) that judges should not "hide the ball" of interpretive theory and (2) that there is some level of public accountability for Court decisions.

In addition to the public character of the Court's constitutional analysis, Justice Brennan was interested in the finality of Supreme Court decisions on constitutional law.[108] Such decisions hold the force of law and power of the State.

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96 Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL OF RTS. J. 223, 228 (1998).

97 Rodney A Grunes & Jon Veen, *Justice Brennan, Catholicism, and the Establishment Clause*, 35 U.S.F. L. REV. 527, 532 (2001).

98 *See* SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 37 (2010).

99 Grunes & Veen, *supra* note 97, at 535.

100 Brennan, *supra* note 91.

101 *See id.*

102 *See id.* at 442.

103 *Id.* at 433.

104 *Id.*

105 *Id.*

106 *Id.*

107 *See id.*

108 *See id.* at 434.

The Court cannot avoid ruling on important social, economic, and political matters, and a justice's role in a decision is often obligatory. Justice Brennan wrote that, "[t]hese three defining characteristics of my relation to the constitutional text—its public nature, obligatory character, and consequentialist aspect———cannot help but influence the way I read that text."[109] Yet, Justice Brennan's interpretation is not about his conscience but that of the community. He understood that it is the "community's interpretation that is sought."[110] This is not to say that there is one singular interpretation that the community supports. Rather, Justice Brennan theorized that interpretation could neither be based on his personal political preferences, nor the personal preferences of founders long gone.[111] Community interpretation required legitimacy of interpretation within a free society. The Court had to reconcile self-government with the need to invalidate the people's laws for violating a higher law, the Constitution.[112]

Justice Brennan acknowledged the rising tide of originalism. He criticized originalism for "feign[ing] self-effacing deference" in the name of original intent.[113] In reality, he claimed, it was "little more than arrogance cloaked as humility."[114] Justice Brennan asserted that finding the intent of the Founders is an impossible exercise, with sources often conflicting.[115] He argued that it is unclear whose intent we should care about or whether the historical records could come up with anything conclusive.[116] More importantly, however, he attacked originalism not simply for its flaws in practice but also in principle. Justice Brennan charged originalism as having "political underpinnings" as it is slanted toward having a "passive approach" to interpretation.[117] For Justice Brennan, originalism established a presumption against the claim of a constitutional right.[118] This is a political decision because it "expresses antipathy to claims of the minority rights against the majority."[119] Such a theory ignores the "social progress and eschew[s] adaptation of overarching principles to changes of social circumstance."[120] In critiquing originalism, Justice Brennan's living constitutionalism comes into focus. He theorized that interpretation should not be blind to the values behind the Constitution's words (overarching principles).[121] Further, it is the role of the Court to protect the

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109 *Id.*

110 *Id.*

111 *See id.* at 438.

112 *See id.* at 435.

113 *Id.*

114 *Id.*

115 *See id.*

116 *See id.*

117 *See id.* at 436.

118 *See id.*

119 *Id.*

120 *Id.*

121 *See id.* at 437.

minority from the majority, and the Court's interpretation should reflect this understanding.[122]

Justice Brennan believed that an "[u]nabashed enshrinement" of the majority would lead to the possibility of a social caste system.[123] He argued that we cannot expect the majority to look after minority rights.[124] This approach is relevant to Justice Brennan's living constitutionalism because it is a response to one of originalism's major critiques of the theory: that living constitutionalism is undemocratic because it takes important societal questions out of the political realm.[125] Justice Brennan was adamant that the Constitution's text embodies social value choices—choices that are partly outside the realm of the legislature and subject to judicial review.[126] The need for judicial review may be especially salient when considering the period during which Justice Brennan sat on the Court. Southern state legislatures attempted to protect white supremacy at every opportunity.[127] Racist southern senators could bring the national government to a standstill on matters concerning racial progress.[128] This context does not render concerns over institutional capture[129] a thing of the past. There continues to be democratic imbalance in the institutions of today: gerrymandering, the makeup of the Senate (Wyoming and California getting equal representation despite large difference in population size), the electoral college, and legislative capture, among other factors, suggest that these institutions are not perfect. When our—often flawed—democracy collides with human dignity, democracy does not always win. Just like there are times when the constitutional dignity is best judged by the legislatures, so, too, there are times when the Court must choose dignity over democracy because the purpose of the Constitution is to "declare certain values transcendent, beyond the reach of temporary political majorities."[130]

Having recognized the above values—that interpretation is public, that there are serious consequences that flow from decisions, that values can be seen as generalities, and that interpretation must be used to protect minority rights—we come to Justice Brennan's interpretive conclusion. He wrote:

> But the ultimate question must be: What do the words of the text mean in our time? . . . Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place

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122 *See id.*

123 *Id.*

124 *See id.* at 435.

125 *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704–06 (1976).

126 *See* Brennan, *supra* note 91, at 436–37.

127 *See* Badger, *supra* note 31, at 130.

128 *See, e.g.*, FINLEY, *supra* note 32, at 126 (2008).

129 This term is used to mean the ability to control an elected branch of government despite "the will of the voters." *See* Chesterley & Roberti, *Populism and institutional Capture*, 53 EUROPEAN J. OF POL. ECON. 1, 2 (2018).

130 Brennan, *supra* note 91, at 436.

> new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War amendments—abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote—we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of the slave caste.[131]

Contemporary ratification is the legitimization of this vision of the Constitution: one where the Constitution was intended to evolve with the society it governed. With every vote for president or city clerk, with every jury duty summons, with every op-ed and every sit-in, we constantly amend and ratify our Constitution. In fact, this is what gives the Constitution its legitimacy. Naturally, there is no one alive today who was involved with the ratification process. Nor did we inherit a democratic moment. Much of the population at the time of founding was unable to have their voice heard, let alone vote.[132] Many were enslaved.[133] Thus, by understanding that the Constitution is constantly evolving and being reratified by every generation—in its image (its values, concerns, and positionalities)—we are including those who were previously voiceless. We are making the Constitution stronger by making it more workable and more democratic. Further, Justice Brennan understood the Constitution as being a document of dignity. Justice Brennan left us with the following passage:

> As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people.[134]

While Justice Brennan offered the Warren Court numerous ways to legitimize living constitutionalism and a few things to consider in its interpretation, more needs to be done to operationalize the theory. How do we know what the aspirations of our people are? How do we know what dignity means? When do we know the Constitution has been reratified in the new generation's image? The Warren Court grappled with these questions in a variety of ways: one of these was creating the "evolving standards of decency" test.[135]

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131 *Id.* at 438.

132 *See*, *e.g.*, *id* at 436.

133 *See* Thurgood Marshall, *The Bicentennial Speech*, THURGOOD MARSHALL: SUP. CT. JUST. AND C.R. ADVOC., http://thurgoodmarshall.com/the-bicentennial-speech/; *see also* Brennan, *supra* note 91, at 438.

134 *Id.* at 445.

135 Trop v. Dulles, 356 U.S. 86 (1958).

III. EVOLVING STANDARDS OF DECENCY—HOW TO KNOW WHEN SOCIETY HAS MOVED ON

Chief Justice Warren's influence on the Court was profound. *Brown* was not an inevitable conclusion until Justice Warren arrived on the Court. Justice Warren went on to author *Brown*,[136] *Reynolds v. Sims* (one person, one vote),[137] and *Loving v. Virginia* (interracial marriage)[138], among others.[139] Justice Warren, the former Governor of California turned Justice,[140] was admired by his colleagues regardless of their interpretive philosophy. Justice Abe Fortas wrote of Warren: "in presenting the case and discussing the case, [Chief Justice Warren] proceeded immediately and very calmly and graciously to the ultimate values involved—the ultimate constitutional values, the ultimate human values."[141] While the "evolving standards of decency" test coming out of the Chief Justice's opinion in *Trop v. Dulles* concerned only the Eighth Amendment,[142] the test is representative of Chief Justice Warren's general interpretive theory. The test also highlights (1) how to turn Justice Brennan's contemporary ratification theory into a rule and (2) the consequences on our jurisprudence were it not for living constitutionalism.

Trop v. Dulles asked the Court to interpret the Eighth Amendment and decide whether the expatriation of a citizen convicted of wartime desertion was cruel and unusual.[143] The Court declared that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[144] For the Court in *Trop*, this meant evaluating the harm done by the punishment: the expatriated person effectively "lost the right to have rights."[145] The Court looked to other "civilized nations" to find that "statelessness is not . . . imposed as a punishment."[146] Justice Brennan's concurrence in *Furman v. Georgia*[147] later expanded on this interpretation. When tasked with identifying when new standards of decency had emerged, Justice Brennan highlighted the existence of standards in other state jurisdictions as proof of new standards[148] and cited *Trop*.[149] In doing so, Justice Brennan wrote that "[r]ejection by society, of

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136 Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954).

137 Reynolds v. Sims, 377 U.S. 533, 536 (1963).

138 Loving v. Virginia, 388 U.S. 1, 2 (1967).

139 *See generally* G. Edward White, *Earl Warren as a Jurist*, 67 VA L. REV. 461 (1981) (analyzing Warren's opinions on a variety of legal topics).

140 *See id.* at 485.

141 Bernard Schwartz, *Chief Justice Earl Warren: Super Chief in Action*, 33 TULSA L.J. 477, 480 (1997).

142 *See* White, *supra* note 139, at 480–81.

143 Trop v. Dulles, 356 U.S. 86, 87 (1958).

144 *Id.* at 101. The Court cites *Weems v. United States*, 217 U.S. 349 (1910), for this proposition, *id.* at 100–01, one of the only cases also mentioned by Brennan in his article. Brennan, *supra* note 91, at 438.

145 *Trop*, 356 U.S. at 102.

146 *See id.* at 102–03.

147 Furman v. Ga, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

148 *See id.* at 277–78.

149 *See id.* at 269, 277–78.

course, is a strong indication that a severe punishment does not comport with human dignity."[150] Justice Brennan went further to say that historical and modern acceptance factor significantly in such determinations.[151] In reading Chief Justice Warren's opinion in *Trop* and Justice Brennan's concurrence in *Furman* together, a process emerges. The Court cared about (1) the nature of the right taken away, (2) the existence of the standard (form of punishment) in surrounding countries or states, and (3) the trends and changes of the punishment in question (is death penalty use going up or down?).[152] No one factor is sufficient to determine the evolving standard of decency. Rather, the Eighth Amendment "seriously implicated several of the[se] principles, and it was the application of the principles in combination that supported the judgment."[153]

Justice Thurgood Marshall, an avid living constitutionalist,[154] arrived at the Court in 1967.[155] Justice Marshall was a renowned lawyer; he successfully argued *Brown* as Chief Counsel for the NAACP Legal Defense and Education Fund.[156] He was a judge on the Second Circuit and the United States Solicitor General before becoming the first Black American to sit on the nation's highest court.[157] Justice Marshall wrote a concurrence in *Furman* adding teeth to the "evolving standards of decency" test. He believed that certain constitutional questions forever remain open, ready to be interpreted by various "given moment[s]."[158]

Justices Marshall and Brennan both believed that certain punishments involve so much pain and indignity that "civilized people cannot tolerate them."[159] Such penalties "shock[] the conscience and sense of justice of the people."[160] Justice Marshall, however, suggested that the Constitution may prohibit such a punishment regardless of public sentiment on a particular case.[161] Public unanimity on a particular case is not needed in order to find a punishment offensive to contemporary society.[162] Further, the standard for whether a society has evolved does not rely on opinion polls. Justice Marshall wrote, it "is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light

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150 *Id.* at 277.

151 *See id.* at 280–82.

152 *Id.* at 277–78.

153 *Id.* at 282.

154 *See* Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court,* 6 HARV. BLACKLETTER J. 27, 34 (1989).

155 *See id.* at 45, 48.

156 *See* TIM MCNEESE, BROWN V. BOARD OF EDUCATION: INTEGRATING AMERICA'S SCHOOLS 54 (2007).

157 *See* Greene, *supra* note 154, at 28.

158 *Id.* at 330 (Marshall, J., concurring).

159 *Id.*; *see id.* at 305 (Brennan, J., concurring).

160 *Id.* at 360 (Marshall, J., concurring) (quoting United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952), *reh'g denied*) (internal quotations omitted).

161 *Id.* at 361.

162 *See id.*

of all information presently available."[163] He also believed such information should be contextualized. Justice Marshall observed that the death penalty is a tool of white supremacy and an arm of racism, and racism should shock the conscience.[164] Thus, the vague idea of contemporary ratification has been whittled into a workable standard. The Eighth Amendment prohibits punishment that shocks the conscience of our society and disregards the dignity of the afflicted individual. We can determine whether a punishment shocks the conscience of our society by looking at its use, the trend of its use in other jurisdictions, the nature of the right being infringed upon, and the surrounding inequalities that give the punishment context.[165] We do not need to poll the citizenry but rather we adopt a standard similar to that of a "reasonable person" standard: what would a citizen think if they

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[163] *Id.* at 362. After *Furman*, support for the death penalty rose. By statute and practice, the death penalty saw a resurgence in the 1980s. *See A Continuing Conflict: A History of Capital Punishment in the United States*, GALE (2016). And while support for the death penalty does decrease when respondents are given more information, the shift was not substantial. Robert M. Bohm & Ronald E. Vogel, *A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions*, 22 J. OF CRIM. JUST. 125, 126 (1994), and Americans preferred life in prison over the death penalty, many respondents still wanted the death penalty as an option. *See* JOHN HANLEY, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY: THE DEATH PENALTY 110, 124 (2008) (chapter). Does this negate the persuasiveness of *Furman* as a living constitutionalist opinion? Justice Goldberg would argue against such a suggestion. Writing to the Court in a memorandum, Justice Goldberg argued that "[i]n certain matters . . . this Court traditionally has guided rather than followed public opinion in the process of articulating and establishing progressively civilized standards of decency." Arthur Goldberg, *Memorandum to the Conference Re: Capital Punishment October Term, 1963*, TEX. L. REV. 493, 500 (1986). He made the counter-majoritarian argument that if the people overwhelmingly supported the proposition, then it would be reflected in the legislature. This can be disputed, of course, as there are many issues that enjoy widespread support but no legislative movement. However, even if this was not so, Justice Goldberg understood evolving standards of decency to be a task of the judiciary. He cited *Weems v. United States* to say that "[o]ur contemplation cannot be only of what has been but of what may be." *Id.* at 501 (quoting Weems v. United States, 217 U.S. 438, 373 (1909). It should not be lost that this seems to contradict Justice Brennan's approach. In fact, the three justices can be seen on a spectrum: Justice Brennan is interested in public opinion, Justice Marshall is interested in the opinion of a hypothetical informed citizen, and Justice Goldberg believes the evolving standards of dignity are areas in which the Court can lead.

[164] *See Furman*, 408 U.S. at 364–66 (Marshall, J., concurring).

[165] Chief Justice Warren, Justice Brennan, and Justice Marshall all stressed that the personal predilection of the justices should be ignored. Further, while the evolving standards of decency test came from the Warren Court, scholars and justices from the Burger Court also looked to operationalize the standard. *See* Andrew Leon Hanna, Note, *Solitary Confinement as Per Se Unconstitutional*, 21 J. CONST. L. ONLINE 1, 2 (2019). In 1988, the Court looked to professional consensus as another way of understanding the standard. *See id.* at 7. While the justices stressed that personal predilections should be ignored, the reality is that values frequently play a role in all interpretive theories. Thus, the question of what makes a workable standard is not whether it invites judicial values but rather how legitimate is the theory given the premise that a judge's predilections inevitably influence decision making. Justice John Paul Stevens, a justice that often utilized living constitutionalism wrote on this topic in his dissent in *McDonald v. Chicago*, writing:

> Justice Cardozo's test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. . . . [H]istorical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the 'traditions and conscience of our people,' are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action.

McDonald v. City of Chicago, 561 U.S. 742, 872 (2010) (Stevens, J., dissenting) (citations omitted),

knew all the facts? In this way, contemporary society speaks out against a law passed by a majority in a legislature, often a law from a previous era or a renegade state.[166]

This approach to living constitutionalism was applied by the Warren Court for years. The Warren Court's use of trends in state jurisdictions was prevalent in criminal procedure cases such as *Mapp v. Ohio*. There, the Court commented on the trends in state legislatures and judiciaries in adopting the exclusionary rule.[167] There is little evidence that the Founders believed in an exclusionary rule,[168] but the changes in society—coupled with pragmatic necessities—demanded that the exclusionary rule be part and parcel of the Fourth Amendment.[169] There are also themes of an evolving-need test in the voting rights cases of *Baker v. Carr*[170] and *Reynolds*.[171]

IV. THE PENUMBRA OF JUSTICE DOUGLAS

Justice Douglas's living constitutionalism is harder to pinpoint. Little scholarship is dedicated to his interpretive theory despite the fact that Justice Douglas served on the Court for thirty-six years. Professor Ronald Dworkin offered some analysis, noting that Justice Douglas often championed a theory of individual rights that both preexisted the Constitution and that the Founders enshrined into the Constitution.[172] Dworkin too, however, appears to give up in searching for immutable principles.[173] This behavior is understandable as Justice Douglas largely shunned such approaches.[174] In many ways, Justice Douglas was a legal realist who believed a large portion of all judicial opinions were centered around one's "gut."[175]

Despite professing to be against lawmaking through judicial whim (and claiming that this was what the Burger Court was doing),[176] Justice Douglas was quick to find new liberties within the text of the Constitution. Justice Douglas found rights for the poor, disadvantaged, and downtrodden in the name of the Founding

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166 States are allowed experimentation and to be a laboratory of democracy. They may not do so, however, when constitutional rights are at stake. U.S. Const. art. VI, cl. 2.

167 Mapp v. Ohio, 367 U.S. 643, 651–53 (1961).

168 *See, e.g.*, *The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing on S. 3 Before the S. Comm. on the Judiciary*, 104th Cong. 8 (1995) (statement of Akhil R. Amar, Southmayd Professor of Law, Yale Law School). *But see* Roger Roots, *The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L.J. 42, 42 (2014).

169 *See, e.g.*, Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1886, 1925 (2014).

170 Baker v. Carr, 369 U.S. 186 (1962); *see* Abner J. Mikva, *Justice Brennan, and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. Ill. L. Rev. 683, 685–87.

171 Reynolds v. Sims, 377 U.S. 533 (1964); *see* Edward M. Goldberg, *Mr. Justice Harlan, the Uses of History, and the Congressional Globe*, 15 J. OF PUB. L. 181, 185–86 (1966).

172 *See* Ronald Dworkin, *Dissent on Douglas*, N.Y. REV., Feb. 19, 1981, at 3–8.

173 *See id.*

174 *See* DOUGLAS, *supra* note 52, at 47.

175 *See* DOUGLAS, *supra* note 52, at 8; *see*, *e.g.*, Raoul Berger, *The Role of the Supreme Court in Democratic Society*, 26 VILL. L. REV. 414, 414 (1981).

176 *See* DOUGLAS, *supra* note 26, at 47.

Fathers for ideas that even modern society did not support, let alone the Founding Era.[177] While Justice Douglas called out the "balancing" of the "Frankfurter school,"[178] it was Justice Douglas himself who often engaged in judicial balancing.[179] When reading Justice Douglas's autobiography, one could easily conclude that he was sympathetic to textualism and originalism.[180] Yet, upon reading his conference notes, few aspects of his approach mirror those he professed.[181] Certainly, many of the opinions he wrote or joined have received criticism from originalists.[182] It would seem that, on the surface, Justice Douglas was a man of interpretive contradiction. He was born into the legal realist school only to say that his opinions did not reflect his personal predilections.[183] He was one of the greatest advocates for expanding and innovating civil liberties, only to claim that these rights were not innovative at all.[184] Further, the Warren Court's liberals loved judicial balancing and used it frequently to the horror of Justice Harlan, Justice Frankfurter, and Chief Justice Burger, even if Justice Douglas asserted otherwise.

Justice Douglas was an influential figure in the Warren Court's living constitutionalist jurisprudence. This seems at odds with the above analysis. In some ways, the narrative of Douglas's inconsistency is true: his interpretive theory in practice does not perfectly align with the theory he professed to use. Justice Douglas accused Justice Frankfurter of using judicial balancing while he (Justice Douglas) just focused on the text.[185] The opposite is likely more accurate. In fact, Douglas contributed two major parts of the Warren Court's living constitutionalism: (1) the penumbras of rights[186] and (2) interpretive scope.[187] In doing so, he tied the Founding Era to living constitutionalism and supplied a blueprint for how anti-originalists should think and interpret sources from the Founding Era.

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177 *See id.* at 52–53.

178 *See id.* at 48.

179 *See*, *e.g.*, Mary M. Lay, *Midwifery on Trial: Balancing Privacy Rights and Health Concerns After* Roe v. Wade, 89 Q. J. OF SPEECh 60, 63 (2003).

180 *See* DOUGLAS, *supra* note 52, at 53.

181 *See* Douglas, *supra* note 70 (Douglas papers).

182 *See* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 37 (1999).

183 *See* C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895, 901 (2008) (writing that Douglas was a "product of the legal realist movement"); Dworkin, *supra* note 172, at 904 (describing how Douglas recognized judging as "inescapably subjective"); Urofsky, *supra* note 42, at 138.

184 *See* Kenneth L. Karst, *Justice Douglas and the Equal Protection Clause*, 51 IND. L.J. 14, 16–17 (1975); DOUGLAS, *supra* note 52, at 52–53.

185 DOUGLAS, *supra* note 52, at 52–53.

186 This Article will analyze the penumbras theory as Justice Douglas's. He wrote the chief case, *Griswold v. Connecticut*, 381 U.S. 479 (1965), that would become the fundamental penumbra case leading to *Roe v. Wade*. 410 U.S. 113 (1973). In truth, however, it was Justice Brennan that suggested to Justice Douglas that he adopt the penumbras theory of interpretation. Douglas originally wanted to write *Griswold* as a freedom of association case. Letter from William J. Brennan, Jr., Just. of the Sup. Ct. of the U.S., to William Douglas, Just. of the Sup. Ct. of the U.S. (Apr. 24, 1965) (on file with Professor Michael Klarman).

187 *See* Sovern, *supra* note 54, at 350 ("Douglas, in his more freewheeling style, found greater comfort and scope in some of the broad generalized phrases of the Constitution.").

The Penumbras of Rights theory originated from Douglas's opinion in *Griswold v. Connecticut*.[188] The balancing act of the Warren Court—reconciling the evolving nature of the Constitution with the need to be seen as nonpolitical—was immediately on display. While recognizing that justices "do not sit as super-legislatures to determine the wisdom, need, and propriety of laws,"[189] Justice Douglas ardently defended the need for living constitutionalism. He pointed out that a number of rights currently enjoyed were not written into the Constitution or the Bill of Rights, yet the First Amendment was construed to include them.[190] To defend this evolution of the First Amendment, Justice Douglas introduced the idea of a penumbra of rights. Justice Douglas argued that certain constitutional guarantees have penumbras that are "formed by emanations from those guarantees that help give them life and substance."[191] Put another way, a plethora of rights depending upon, encouraging, and defending privacy creates support for the idea that privacy is a right in itself.[192]

Further, the recognition of a privacy right might be a necessary condition that an enumerated right depends upon—an enumerated right being one specifically mentioned in the Bill of Rights. Textual provisions can give rise to themes, and those themes are provisions in themselves.[193] These rights are not made up by the justices; rather, they are "created by several fundamental constitutional guarantees."[194] In defending the legitimacy of penumbras, Justice Douglas cited the history and meaning of the Ninth Amendment.[195] In a concurring opinion, Justice Arthur Goldberg, in furtherance of unenumerated rights, cited

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188 *Griswold*, 381 U.S. at 483–85 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.").

189 *Id.* at 482.

190 *Id.*

191 *Id.* at 484.

192 Many have suggested the penumbras are just a modern form of "doing *Lochner*:" the idea that the Court finds unenumerated rights to support deregulation (often with an insinuation that such rights were recognized because of political preferences). *See* Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 296 (1986); Eric Segall, *Free Speech and Freedom of Religion*, 35 GA. ST. U.L. REV. 937, 948 (2019) (transcript from a live panel) (using the term doing *Lochner*). Justice Douglas vehemently rejected this accusation. *See id.* at 481–82. Justice Douglas maintained he was tied to the text and structure of the Constitution. DOUGLAS, *supra* note 52, at 52–53. It is not that he was taking some natural law principle out of thin air—rather, these were modern moral principles that emanated from the Constitution. They are not imposing a particular economic system onto the Constitution. They were derivable from its "logic" or "structure." *See* Eugene McCarthy, *In Defense of* Griswold v. Connecticut*: Privacy, Originalism, and the Iceberg Theory of Omission*, 54 WILLAMETTE L. REV. 335, 346 (2018). Justice Douglas would likely further argue that the Founders themselves were proponents of natural law inferences deriving from the text. *Id.* at 347 ("The right to privacy, in other words, predates and supersedes the written Constitution and Douglas believed that the drafters recognized this fact.").

193 *See Griswold*, 381 U.S. at 484–85.

194 *Id.* at 485. The view that privacy was essential to "ordered liberty" was shared by many justices including the influential conservative Justice Harlan. JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 453 (2007).

195 NEWTON, *supra* note 194, at 484.

Snyder v. Massachusetts[196] for its proposition that the Due Process Clause protects liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[197] Thus, we begin to see the application of living constitutionalism. The conscience of people changes and evolves.

Further still, the fundamental values of our nature—such as liberty, dignity, or justice—are understood with differing lenses. For the enumerated rights to work in a changing and modern world, the penumbras must change with them in order to create a functioning, governing document. In fact, it is often the unenumerated penumbras that are driving the living constitutionalism in these instances. For example, it was Justice Douglas's penumbras of rights that led to the recognition of privacy in *Roe v. Wade*,[198] a decision, like *Brown*, fundamental for modern rights[199] and yet at odds with the Founding Era.[200]

Justices Douglas and Goldberg elaborated on the penumbra of rights theory in their *Heart of Atlanta Motel, Inc. v. United States* concurrences.[201] *Heart of Atlanta* upheld the Civil Rights Act of 1964.[202] Both Justices understood that the purpose behind section two of the Act is about human dignity.[203] This decision is consistent with their interpretation of the purpose behind the Fourteenth Amendment: "[T]he essence of many of the guarantees embodied in the Act are those contained in the Fourteenth Amendment."[204] The *Heart of Atlanta* analysis seems similar to what would later be coined as super-statute purposivism by Professors William Eskridge and John Ferejohn.[205] Instead of using super-statute

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196 Snyder v. Massachusetts, 291 U.S. 97 (1934).

197 *Griswold*, 381 U.S. at 479 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (internal quotations omitted)).

198 Roe v. Wade, 410 U.S. 113,152–53 (1973); NEWTON, *supra* note 194, at 455 ("[*Griswold*] would become a foundation for *Roe v. Wade* in 1973…").

199 *See*, *e.g.*, Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 251 (2008) ("In addition to the right to life and health, women's right to abortion is bolstered by the broad constellation of human rights that support it, such as rights to privacy, liberty, physical integrity and non-discrimination. In fact, it is the evolution of human rights interpretations and applications, stemmed by increased sophistication, women's empowerment and changing times, which have given force to women's human right to abortion.").

200 *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT 291, 291 (2007) (suggesting that criticism of *Roe* often includes that "there is no evidence that the framers and adopters of the 1987 Constitution or of any later amendments expected or intended the Constitution to protect a woman's right to abortion")*; cf.* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 297 (2007) ("Many federal laws securing the environment, protecting workers and consumers—even central aspects of Social Security—go beyond original expectations about federal power . . . ."); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO STATE L.J. 1085, 1093 (1989) (speaking to the intent of the Fourteenth Amendment writers: "[I]t might be possible to establish with some degree of confidence, for instance, that abortion was not considered a fundamental right in 1866 . . . .").

201 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 283 (1964) (Douglas, J., concurring); *id.* at 291–93.

202 *See id.* at 242.

203 *See* Letter from William O. Douglas, Just., U.S. Sup. Ct., to Arthur Goldberg, Just., U.S. Sup. Ct. (Dec. 14, 1964) (on file with Douglas Papers Box 1347, Library of Congress).

204 *Heart of Atlanta*, 379 U.S. at 283 (Douglas, J., concurring).

205 *See* Willian N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) ("Occasionally, super-statutes can reshape constitutional understandings.").

purposes to interpret the meaning of a statute, however, the Court used the theory to understand the Constitution. The large themes of the statute are consistent with the large themes of the Constitution.[206] Put another way, the spirit in which the Civil Rights Act was passed not only passes constitutional muster under the text of the Constitution, but it also passes under the penumbras of rights theory. Justice Douglas can be interpreted as believing that when looking at the intent of the founders, we should look not at the literal intent but at the ethos of the measure—what normative mischief it was trying to solve and what values were encompassed in the solution. Thus, while the Fourteenth Amendment was about making Black Americans equal under the law, it was also about a general push against white supremacy and a general affirmation of Black peoples' rights. On an even more generalized level, the Amendment may have been about curbing hateful power and protecting those who are oppressed. All generalities of the Amendment are valid purposes of the Amendment; all three generalities were present in the ethos of the Amendment writers' intent.[207] Justice Douglas updated the Constitution by changing the generality by which he read the text.

But who says what generality we should use when interpreting the Constitution? Justice Douglas took a macroscopic view of the Fourteenth Amendment. Others may take a microscopic approach and only look at the words and their literal meanings. What makes Justice Douglas's scope correct? Justice Douglas would likely answer that he had not strayed from the text at all; rather, it was Justice Frankfurter who changed the scope.[208] Justice Douglas was just using the scope the law requires.[209] This answer seems unsatisfactory. Justice Douglas may have thought of himself as a great historian of the Founding Era, but so too did Justice Harlan, who often disagreed with Justice Douglas.[210] Justice Douglas would

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206 *See Heart of Atlanta*, 379 U.S. at 283 (Douglas, J., concurring).

207 *See, e.g.*, Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI-KENT L. REV. 1019, 1049 (2014) (arguing that the writing of the Fourteenth Amendment revolved around the rights of Black Americans and the want to curb white supremacy); Marshall, *supra* note 13 ("While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment."); Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1171 n. 76, n. 77 (1988) (describing the previous general intent scholarship and suggesting a way that the Fourteenth Amendment writers' general intent may be used to fight sex discrimination cases).

Remember that Justice Brennan was also a proponent of reading the Constitution at a more general level than the original mischief that inspired the text. He wrote a partial defense of this position in the *Harvard Law Review*.

> For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV 489, 495 (1977)

208 *See* DOUGLAS, *supra* note 52, at 48, 53.

209 *See id.*

210 *See, e.g.*, Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 45–46 (1991).

often take positions at odds with the understanding of the Founding Era,[211] and for good reason. Doing so enabled the Warren Court to end segregation and embrace criminal justice reform.[212] Justice Douglas's tools of performing living constitutionalism (penumbras rooted in the consciousness of the people and changing the scope of intent) may be helpful for living constitutionalists. His rationale for why such interpretation is legitimate may be less helpful. Yet, when Justice Douglas's theory is combined with Justice Brennan's contemporary ratification theory, Justice Douglas's theory gains legitimacy. We need evolving penumbras and changes of interpretive scope to account for communities ignored, enslaved, or simply not present at the time of the Founding. For the Constitution to retain validity, it must be continually ratified to fit contemporary society's image, and Douglas supplies further tools to do so.

V. OPERATIONALIZING THE THEMES OF THE WARREN COURT

Justice Scalia claimed that one needed a theory to beat a theory and that living constitutionalism was merely a vague anti-originalism.[213] Still, others thought that living constitutionalism was a stand-in for the judiciary making things up.[214] This Article has looked at the work of three major Warren Court Justices: Brennan, Warren, and Douglas. Justices Goldberg, Fortas, and Marshall are also important contributors to the Warren Court's living constitutionalist tradition. After examining the Justices work, this Article posits that there are five major tenets of Warren Court living constitutionalism that run throughout the Justices' jurisprudence. These tenets give shape to living constitutionalism and stand as a possible blueprint for future living constitutionalist judges. However, though living constitutionalism is a coherent theory of interpretation, it is important to reject the premise of Justice Scalia's assertion. Proscriptive, empirical, and faux-objective theories are inherently problematic, and one does not need a differing proscriptive, empirical, and faux objective theory to "beat" a previous one.

A. The Five Tenets of the Warren Court's Living Constitutionalism

The first tenet is that the Warren Court looked to protect those who lacked a voice in our democracy. When interpreting the Constitution, the Warren Court often considered the power dynamics of those involved. The Warren Court expanded the rights of the accused,[215] a group of Americans incredibly vulnerable to the whims of

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211 *See*, *e.g.*, WHITTINGTON, *supra* note 182, at 37.

212 *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 67–68 (2018) (explaining that it would be hard to justify *Mapp* as an originalist opinion).

213 Scalia, *supra* note 1, at 855.

214 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND L.J. 1, 11–12 (1971).

215 *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961).

the majority.[216] The Court defended a married couple's right to privacy.[217] The Court protected communists' First Amendment right to association.[218] Further, the Warren Court was quick to act in a countermajoritarian fashion when the majoritarian machinery was the problem. In response to massive voting inequities between rural and urban voters, the Warren Court established the principle of one person, one vote in the cases of *Baker* and *Reynolds*.[219] This was contrary to the Founding Era's understanding of constitutional construction. Yet, one person, one vote is now considered to be a core principle of American constitutional law.[220] This is probably because the principles that the Constitution stands for work best in the modern era within the one person, one vote system (the Founders had no idea how large urban cities would be). Living constitutionalism interprets the Constitution with the understanding that special attention needs to be paid when a certain group has faced historical discrimination and/or has no access to economic, social, or political influence.[221]

A second shared theme of the Warren Court is an understanding that, in many respects, the Founding Fathers were flawed, not everyone was at the table during the original ratification process, and that citizens ratify the Constitution today in their own image.[222] This ratification is constantly occurring. It happens through political participation, jury duty, military service, charity, activism, state government work, federal government work, and much more. How does one know how the people ratify the Constitution in their own image? How do they actually do the interpreting? One way is through the interpretation of super-statutes. Super-statutes can give great insight into how a new generation understands an old provision.[223] This does not mean super-statutes can decide constitutionality. They reinforce and contribute to it. Professors Eskridge and Ferejohn explained that often "the super-statute is one of the baselines against which other sources of law—sometimes including the Constitution itself—are read."[224] Thus, the people of the 1960s ratified the Fourteenth Amendment in their image when they crystalized a

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216 *See* Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 644–46 (2000) (discussing the relationship between retributivism, criminality, and democracy).

217 *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

218 United States v. Robel, 389 U.S. 258, 262 (1967).

219 *See* J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 3 (2014).

220 *See* David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 974 (2011).

221 *See* Franciska Coleman, *From Protection to Empowerment*, 101 B.U. L. REV. 1879, 1882 (2021) ("[O]n one side are those deeply invested in substantive fairness, such as proponents of living constitutionalism's minority protection model.").

222 *See*, *e.g.*, Brennan, *supra* note 91, at 438; STONE & STRAUSS, *supra* note 76, at 6.

223 An example being the Civil Rights Act of 1964 or the Voting Rights Act of 1965. Civil Rights Act of 1964, 42 U.S.C. §1971 et seq. (1988); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

224 Eskridge & Ferejohn, *supra* note 205, at 1216.

new constitutional understanding through the Civil Rights Act.[225] This was a democratic process that fundamentally altered our accepted norms and relationship to the Constitution: it was reratified with a new understanding.[226]

Another way to understand the Warren Court's second theme is through the "state laboratory" model. This model proposes that action on a state level can be a great indicator of shifting moral winds.[227] From *Brown* to *Mapp*, from the death penalty to LGBTQ+ rights cases, the Court has consistently looked at state law or legal interpretation as a benchmark for societal changes.[228] The Court then applies the new norm and forces the regressive holdout states to get on board. Further, international custom and foreign policy concerns played a large role in *Brown*.[229] In today's terms, if everyone around the world has condemned the death penalty, it may be a sign to look inward and see if the American people have come to read the Eighth Amendment differently. Lastly, a judge can look at the context of an issue—how would a contemporary person understand a provision if they knew all the contexts? State movement on a legal issue is certainly not necessary for a living Constitution, but it can be a helpful tool in understanding legal evolution.

A third interpretive theme involves understanding the "intent" and "purpose" of a provision at different levels of generality, depending on the case at hand. Often, the Warren Court cared less about the particulars of what the Founders or amendment writers literally thought about and more about the ethos of mischief and context they were operating. For instance, it is unlikely that the writers of the Fourteenth Amendment were thinking about the LGBTQ+ community. Yet, the discrimination by those in power against a group that faced systematic oppression *was* a major concern.[230] Another example may be the debate over a colorblind constitution. The purpose of the Fourteenth Amendment was to make people equal.[231] But there is a strong argument that to truly have equality, we cannot

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225 *Id.* at 1237 ("[T]he Civil Rights Act is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law.").

226 *See id.* at 1237, 1240 ("[T]he Civil Rights Act has pervasively affected the evolution of public law.").

227 *See*, *e.g.* Mapp v. Ohio, 367 U.S. 643, 651–58 (1961).

228 *See*, *e.g.*, Goodwin Liu, *State Courts and Connotational Structure*, 128 YALE L.J. 1304, 1311, 1317 (2019) (writing a book review of JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018)); Furman v. Ga, 408 U.S. 238, 277–78 (1972) (Brennan, J., concurring); Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. 31, 37 (2017); Greg Strauss, *What's Wrong with* Obergefell, 40 CARDOZO L. REV. 631, 634 (2018).

229 *See* Jon Hanson & Jacob Lipton, *Occupy Justice: Introducing the Injustice Framework and a Foreword*, 15 HARV. L. & POL'Y REV. (2022 forthcoming) (explaining that America's racism had become a national embarrassment and an international liability); Anthony Lester, Brown v. Board of Education *Overseas*, 148 PROCE. OF THE AM. PHIL. SOC'Y. 455, 459 (2004) ("Although the Court's opinion in Brown made no reference to these considerations of foreign policy, there is no doubt that they significantly influenced the decision.").

230 *See* Brennan, *supra* note 91, at 433; Coleman, *supra* note 221; STONE & STRAUSS, *supra* note 76, at 25 ("The framers of the Fourteenth Amendment did not believe they were outlawing school segregation, but they did have a vision of equality, and the Warren Court carried forward that vision and adapted it for our time.").

231 *See* Marshall, *supra* note 13 ("While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.").

pretend to have colorblindness. Such colorblindness is not helpful to the goals of the Fourteenth Amendment.[232] This is a combination of history and intent at a generality that makes it workable and effective in a modern era. The right to equality is still there, but we have a new idea of what equality means and how we get there. As to what level of generality to choose, a Court could look at what level would faithfully align the intent of the clause with the realities of the modern world, what level would include communities previously left out of the constitutional framing, or what level of generality is chosen by most state courts.

The fourth pillar of the Warren Court's interpretive theory is pragmatism. This is somewhat derived from the above themes—the need to make the Constitution "work" in a modern society. Judicial pragmatism can take many forms. One form of outcome-driven pragmatism is concerned with making the law actually function in modern society.[233] It is less about modern morals and more about modern innovations in technology or how we communicate. Another form of pragmatism focuses on valid considerations of the political capital possessed by the Court and the judicial competency of the Court.[234] Living constitutionalist theory incorporates such concerns into how we read the Constitution.

Lastly, the fifth pillar of the Warren Court's living constitutionalism did not ignore history, precedent, and text. They were an important part of the balancing test and should be a sizable part of most living constitutionalist approaches, just not the only part.[235] Further, precedent acts as an important restraint on the judiciary, and living constitutionalists often respect precedent as a part of the evolutionary constitutional system.[236]

B. Counterarguments

Disagreements with this Article's thesis may take three forms: one can criticize as an originalist, one can criticize as an advocate of judicial restraint more generally, and one can criticize as a historian. This Part will focus on the first two criticisms. Both can argue that the paper has not accurately interpreted the Warren Court's analysis. Critics of the latter interpretation may be joined by members of the Warren Court who would disagree with this Article's assessment of their

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[232] *See* Dennis Parker, *The 14th Amendment Was Intended to Achieve Racial Justice – And We Must Keep It That Way*, ACLU (July 9, 2018, 5:45 PM), https://www.aclu.org/blog/racial-justice/race-and-inequality-education/14th-amendment-was-intended-achieve-racial-justice ("[T]he Fourteenth Amendment was never a colorblind document. The amendment was enacted specifically for purposes of assisting newly freed Black people.").

[233] *See*, *e.g.,* Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. OF CRIM. L 475, 477, 497–99 (2013).

[234] *See e.g.*, Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and* Brown, 72 TEMP. L. REV. 51, 53 (1999).

[235] *See* Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358 (2007) (explaining that living constitutionalism looks at history as part of a larger "motley constellation" of interpretation but that living constitutionalism does not "privilege history").

[236] STONE & STRAUSS, *supra* note 76, at 24, 60.

jurisprudence. Particularly, Justice Douglas may take issue with this Article's categorization of his interpretation.

Originalist opponents of living constitutionalism have argued and will argue that this theory is ripe for abuse. Their argument takes two major forms: (1) that living constitutionalism is illegitimate and (2) that it is unworkable.[237] The second deserves further attention, as the first has been largely addressed throughout the Article. Originalists will say that judges can just shift the generality (or scope) to the exact point where they get the result they want.[238] Imagine conservatives doing this with corporate donations, gerrymandering, or civil rights. In fact, this will be, and has been, a chief criticism of all forms of living constitutionalism.[239] They will allege that a judge could interpret contemporary ratification to mean whatever they want it to mean.[240] The Warren Court cited trends in state movement in *Mapp*[241] and *Gideon v. Wainwright*.[242] Yet, the movement for *Mapp was not* sweeping. About half the states had an exclusionary rule, and many of the states had that rule imposed by the state judiciary.[243] State trends are thus not constraining and do little actual work in interpretive philosophy. The themes of the Warren Court's living constitutionalism may just be rationales for already decided outcomes. One could argue that if the above analysis is the case, then Justice Scalia was right. There is no real theory here. Even if it is true that there are cohesive themes that run through living constitutionalism, they are shared themes for judicial fiat.

Further, even if the law involves understanding the evolving standards of decency, do we really want the Court making that call? Chief Justice Warren

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237 *See* Scalia, *supra* note 1, at 855; Richard F. Duncan, *Justice Scalia and the Rule of Law: Originalism vs. the Living Constitution*, 29 REGENT U.L. REV. 9, 11 (2016); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 703–06 (1976).

238 > The power of extreme generalization was demonstrated by Justice William O. Douglas in *Griswold v. Connecticut*. In *Griswold* the Court struck down Connecticut's anticontraception statute. Justice Douglas created a constitutional right of privacy that invalidated the state's law against the use of contraceptives. He observed that many provisions of the Bill of Rights could be viewed as protections of aspects of personal privacy. He then generalized these particulars into an overall right of privacy that applies even where no provision of the Bill of Rights does. By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers.
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> *See*, *e.g.*, Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN. D. L. REV. 823, 828 (1986) *See also* Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 CHI. L. REV. 1057, 1058 (1990) (discussing Justice Scalia's views on generality).

239 The criticism that judges can inject their values by changing scope is also one of the major criticisms of originalism. *See*, *e.g.*, *id,* at 1062–63; Lino A Graglia, *"Interpreting" The Constitution: Posner on Bork*, 44, STAN. L. REV. 1019, 1044 (1992); Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1918 n.94 (1995).

240 *See* Duncan, *supra* note 237, at 11 ("The so-called Living Constitution is not law but rather clay in the hands of Justices who shape it to mean whatever they believe it '*ought* to mean.'") (emphasis in original) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 39 (1997)).

241 *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961) (citing Elkins v. United States, 364 U.S. 206, 224-32 (1960)).

242 *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

243 *See* Liu, *supra* note 228, at 1317.

advocated for Japanese internment during his time in California politics.[244] And Justice Hugo Black had previous ties to the Ku Klux Klan.[245] One may wonder why their opinions on decency count. In fact, it is living constitutionalists that often argue that all judges are inherently infallible and that pretending judges simply call "balls and strikes" is misleading.[246] It may seem logically inconsistent for someone to argue that judges are flawed *and* that they should determine whether the Constitution has evolved. Originalists and judicial minimalists may argue that while legislators retain the same imperfections, there are at least more legislators and realistic ways of getting rid of them. A judicial minimalist may agree with many living constitutionalist premises but view them as a good reason for less judicial review. The argument goes that if the Constitution does evolve, then the process of evolution belongs in the peoples' elected representatives.

There are generally three responses this Article provides, as informed by the Warren Court's jurisprudence: (1) living constitutionalism supports democratic principles; (2) living constitutionalism at times does not support majority rule and that is okay; and (3) even if the above arguments are unpersuasive, they are better than the alternative. The first is the hardest to support—is the Court a democratic instrument? To begin, it is important to note that living constitutionalism is not only for the federal bench. It is a theory that has, and should be, applied by state courts, many of whom are elected.[247] In fact, Justice Brennan argued that more attention should be given to how state courts read their constitution.[248] Regarding the federal bench, it would be an exaggeration to suggest there is no democratic function whatsoever. Judges are selected by the democratically elected President and affirmed by the democratically elected Senate. It would also be wrong to suggest that courts are unaccountable to the people. The Supreme Court is constantly looking for middle ground, preserving capital, and adapting to political pressures.[249] There are many instances of the Court retreating after political pushback.[250] As to the theory itself, aspects of living constitutionalism are concerned with taking the temperature of society. And, as mentioned previously, living constitutionalism brings communities into the constitutional fold that were previously left out. Often, living constitutionalism can allow courts to fight Congress

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244 *See* G. Edward White, *The Unacknowledged Lesson: Earl Warren and the Japanese Relocation Controversy*, 55 VA. Q. REV. 613, 615 (1979).

245 *See* William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 CHI. L. REV. 1, 12 (1973).

246 *See* Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 NW. J.L. & SOC. POL'Y. 35, 37–38 (2012).

247 Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1144 (2012).

248 *See* Brennan, *supra* note 91, at 436.

249 John M. II Scheb & William Lyons, *Public Perception of the Supreme Court in the 1990s*, 82 JUDICATURE 66, 66 (1998).

250 *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1366 (2004); Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246 (1968).

in a manner that preserves democracy.[251] There is also little evidence to suggest that living constitutionalist courts invalidate congressional laws more than other courts.[252] In fact, living constitutionalist opinions may influence the legislature to take the issue more seriously and expand upon the court's decisions, thus igniting the democratic process on key issues.[253] Lastly, while the Court is not a perfect democratic institution, neither are the legislative or executive branches, which each possess numerous problems, from gerrymandering to the electoral college.

There are times, however, where the Court should not be interested in majority rule. It should be focused on dignity. The Warren Court's justices were living during a time of segregation. Racist southern legislatures and federal politicians were blocking and harassing the civil rights movement.[254] The powerful majority was looking to subjugate the minority and use democratic institutions to do it. The progressive justices understood that there was a certain dignity in the Constitution that transcended the political branches.[255] Majority rule can be at odds with constitutional dignity. It was hard to trust the political branches to fix a problem when access to the political branches was the problem itself. Someone needed to protect the constitutional rights of the Brown family when it was clear there was no legislative appetite to do so. Professor Erwin Chemerinsky wrote in defense of judicial review:

> [Many] times there is the tyranny of the majority. Laws enforcing segregation existed throughout the South and likely would have lasted long beyond their invalidation by the Supreme Court if it had been left to the political process. Throughout history, majorities have persecuted racial, religious, and political minorities. This, too, is

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251 [I]t would be highly desirable to have a Supreme Court that could at least play some role in righting the ship as the Warren Court did in the 1950s and 1960s when it addressed such long standing deficiencies of American democracy as segregation, malapportioned legislative districts, and a brutally unfair criminal justice system. (citations omitted).

See Lynn Adelman, *The Roberts Court's Assault on Democracy,* 14 HARV. L. & POL'Y REV. 131, 133 (2019

252 *See* Akhil Reed Amar, *The Warren Court and the Constitution (with Special Emphasis on* Brown *and* Loving*)*, 67 SMU L. REV. 671, 687 (2014) ("[I]n Warren's sixteen years as Chief, the Court invalidated acts of Congress in twenty-three cases—about the same clip that had prevailed in several earlier periods, and a somewhat lower rate than in the ensuing Burger-Rehnquist Court . . . . "); STONE & STRAUSS, *supra* note 76, at 3–4 (describing how the Warren Court was hesitant to strike down congressional legislation, unlike the conservative Court that followed).

253 *See* Klarman, *supra* note 47 (describing how the Court's decision in *Brown* allowed Congress to enact civil rights legislation due to the raised salience of civil rights issues whereas previous legislative efforts had failed). However, Klarman went on to say that the legislation would be "limited in scope and largely ineffectual." *Id.*

254 *See*, *e.g.*, HOWARD H. QUINT, PROFILE IN BLACK AND WHITE: A FRANK PORTRAIT OF SOUTH CAROLINA 154–63 (1958); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1054 (2013); KLARMAN, *supra* note 27, at 209–212.

255 *See* Michael Anthony Lawrence, *Justice-as Fairness as Judicial Guiding Principle: Remembering the John Rawls of the Warren Court*, 81 BROOK. L. REV. 673, 686 (2016).

> popular constitutionalism, but hardly the one that any of us want to preserve.[256]

The Constitution serves many important functions. One of those functions is to highlight a group of rights that are not subject to the majority's whims—to protect the minority from majority rule.[257] It is the Court's job to understand these rights and to make them adaptable to the modern era. As Justice Brennan noted, to not do so is a political choice in itself, one against the creation of unenumerated rights.[258] It is the job of living constitutionalism to see new and modern threats to the dignity of the minority and address them adequately.[259]

The last and perhaps easiest way to defend living constitutionalism from critique is that—while it is not perfect—it is better than the other options. Originalism and the theory of judicial restraint involve courts making political decisions. There is no one way to be an originalist, and thus, it is possible originalism to come to differing conclusions. *District of Columbia v. Heller*[260] is a famous example of this problem. The same theory was used on the same fact pattern,[261] yet originalism allowed the liberal judge to rule in a liberal way and the conservative judge to rule in a conservative way.[262] This is a problem for a theory that maintains to be objective and predictable. A judge can use whichever form of originalist theory gets them to their preferred destination. Worse still, judges using the same form of originalism can come to different conclusions on the same case, often along party lines.[263] When originalist judges include subjectivity, it is hidden. Of course, living constitutionalism absolutely is prone to judicial values. This is not a judge doing whatever they want. Rather, living constitutionalism is susceptible to judges making subconscious decisions because of deep-rooted values. Something can

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256 Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 683 (2004).

257 *See* Lain, *supra* note 250, at 1361–62.

258 *See* Brennan, *supra* note 91, at 436.

259 *Id.* at 689 (Professor Chemerinsky writes that, "[m]y fear is that popular constitutionalism will cause future progressive judges to practice judicial restraint and not to enforce the Constitution to advance liberty and equality.").

260 District of Columbia v. Heller, 554 U.S. 570 (2008).

261 *Id.* at 575–76 (concerning the right to own a handgun in the home).

262 *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 325–27 (2009) (writing that both the majority and the dissenting opinion in *Heller* were originalist); James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 448–50 (2013) (explaining the different approaches that Justices Scalia and Stevens took to understanding the Second Amendment's original meaning); Shaman, *supra* note 72, at 107–08 (describing how originalism was used to obscure judicial policy making in *Heller*); *compare* District of Columbia v. Heller, 554 U.S. 570, 582–86 (2008) *with* 554 U.S., 641–80 (Stevens, J., dissenting).

263 *See* Rory K. Little, Heller *and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1418 (2009) ("But even after one slogs through all forty-five slip opinion pages of the *Heller* majority's historical effort, the one of much more heat than light. Moreover, any overall feeling one might have of being impressed is quickly dispelled by Justice Stevens's equally impressive (if also equally one-sided), and directly contrary, historiography in dissent.").

be both subjective and legitimate.[264] Judges are supposed to use discretion and their best judgment in solving controversies. The Constitution as a document is political in the sense that it distributes power and defines rights. Suppose, however, as many do, that the idea of an objective judiciary is desirable. Living constitutionalism is preferable in such a scenario to that of originalism because, unlike living constitutionalism, originalism allows a judge to bring values into a case while purporting to be objective.[265] There is less judicial accountability because the values are hidden behind the suggested Founders' intent.[266] In this way, originalism is just as activist as the Warren Court's living constitutionalism but far less transparent. To play off of a famous Scalia phrase, originalism is the wolf that comes as a sheep.[267]

If both sides of the debate are open to judicial subjectivity, it is far more preferable to adopt the one that is transparent. While almost all living constitutionalists insist that they are not turning the judiciary into a legislative body or imbuing their own policy preferences into law, when they do, they can be called out on it. Justice Brennan wrote that a core aspect of his interpretive theory was that it was public.[268] When a living constitutionalist justice attempts to interpret evolving standards of decency, they do this by following the themes outlined in this Article. But they never pretend it is an exact science. They never suggest that "decency" or "dignity" are not value judgments. They are. But by adopting an interpretive theory that understands the law cannot be some sort of machine—plug a question into the originalist meter and the answer comes out—they open themselves up to public accountability.[269] Legislatures, the president, fellow judges, the press, and the people can all follow along. They can locate when and where value judgments must be made and respond accordingly.[270] No such process can happen with originalism. The judicial value judgments are hidden behind a sheen of objectivity; they are lost amongst the history of the Founders. Justice Brennan wrote, "while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should

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264 *Cf.* Erwin Chemerinsky, *There is No Such Thing as Objective Judging*, YAHOO! NEWS (Nov. 18, 2014), https://news.yahoo.com/no-thing-objective-judging-110028906--politics.html ("The values and views of the judge matter enormously and always will. There is no such thing as objective judging, and it is wrong to pretend otherwise.").

265 *See*, *e.g.*, Shaman, *supra* note 72, at 107.

266 *See id.* at 97. In addition, the Founders themselves were not exceptionally fond of democracy. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP 606–07 (2016) (suggesting that by strictly adhering to the Founders' intent, originalism can be anti-democratic).

267 *See* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

268 Brennan, *supra* note 91, at 438.

269 *See id.*

270 *See also* Wheatley, *supra* note 21, at 110–11 (describing transparency as being important in addressing implicit bias).

not escape notice."[271] Contrary to the claims of originalists, political judgments are as essential in originalism as they are in living constitutionalism.[272]

And while the dead hand problems of originalism have been discussed by legal scholars at length, it should be noted here that even if originalism was a value free interpretive theory, it would still suffer major defects: it leads to unworkable and often heinous outcomes.[273] It is clear that the writers of the Fourteenth Amendment did not intend for the Amendment to forbid a ban on gay marriage. But we live in a society far different than that of those Amendment writers. We have different values, understandings, and practices; originalism suffers from the dead hand problem in a way living constitutionalism does not.[274] A rigid historical test does a disservice to our Constitution as a forward-looking document. Justice John Paul Stevens—who did not serve on the Warren Court but served with Justices Brennan and Marshall and adopted many aspects of the Warren Court's living constitutionalism—summarized this flaw of originalism when he wrote:

> For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection," then the guarantee would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection. That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently "'rooted'"; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history . . . .[275]

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[271] Brennan, *supra* note 91 at 435–36.

[272] [O]riginalism does not obviate the necessity of making value judgments to interpret the Constitution. Instead, it masks the policymaking function of constitutional interpretation by pretending that the meaning of the Constitution is dictated by its original understanding. Although originalism may present itself as value-neutral, in truth it is nothing of the sort; with originalism, value judgments are made covertly through the illusion of original meaning.

Shaman, *supra* note 72, at 107

[273] *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 242 (1988); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 7 (2009).

[274] *See, e.g.*, Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1405 (2009) (explaining originalism's dead hand problem).

[275] McDonald v. City of Chicago, 561 U.S. 742, 875–76 (2010) (Stevens, J., dissenting) (footnotes omitted) (citations omitted) (first quoting Washington v. Glucksberg, 521 U.S. 702, 721 n.17 (1997); then quoting Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting)).

Even this critique of originalism is charitable because it assumes that the Constitution was a legitimate democratic document at the time of writing. There is a strong argument that the Constitution had legitimacy flaws from the start—only by adding new voices to the constitutional process can the Constitution begin to gain legitimacy.[276]

Justice Scalia said, "[y]ou can't beat somebody with nobody."[277] This Article is a direct response to the idea that there is no coherent alternative to originalism. The Warren Court provides a strong example of how identified, broad, and shared themes lead to a dignified understanding of constitutional law. It has identified broad and shared themes, not a proscriptive equation.

All interpretive theories share certain imperfections. Originalism's claim that it lacks these imperfections while attempting to criticize living constitutionalism has been consistently called out.[278] If having many sources or being prone to judicial subjectivity makes living constitutionalism an incoherent theory, then originalism must be considered a "nobody" as well.

C. The Impact of the Warren Court's Living Constitutionalism

This Article has focused on demonstrating that the Warren Court had a cohesive living constitutionalist theory by showing where and when such a theory occurred. Perhaps, it is better to articulate living constitutionalism's contribution by discussing what would have happened had the theory *not* occurred. History is not inevitable. As demonstrated in the previous analysis on *Brown*, the Court was very close to ruling the other way.[279] The fundamental one person, one vote standard we take for granted today was inconceivable in the nineteenth century.[280] Without living constitutionalism, the world would look quite different.

The Founding Fathers almost certainly did not believe that segregation would be anything close to unconstitutional.[281] The Fourteenth Amendment writers

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276 [T]he government [the Framers] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.

See Marshall, *supra* note 13; Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1808 (2005) (discussing the moral legitimacy of the Constitution within the context of the dead hand problem).

277 Scalia, *supra* note 1, at 855.

278 *See* Shaman, *supra* note 72, at 107; Greene, *supra* note 154, at 326; Eric J. Segall, *Originalism as Faith*, 102 CORNELL L. REV. ONLINE 37, 37 (2016); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitutionalism*, 75 FORDHAM L. REV. 545, 548–49 (2006).

279 *See* discussion, *supra* Part I.

280 *See Do We Have a Living Constitution?*, *supra* note 220 at 973–74; William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO STATE L.J. 1251, 1268 (2011) (describing how *Reynolds* is inconsistent with an originalist analysis of historical intent).

281 *See* Marshall, *supra* note 13.

did not anticipate it either.[282] Living constitutionalism was necessary for *Brown*; the Court made this explicit when it said that it must "consider public education in the light of its full development and its present place in American life."[283] According to the Court, living constitutionalism is the only way this equal protection claim could be determined.[284] While many originalist scholars have tried to rationalize *Brown* with originalism, still more show how they are inherently inconsistent.[285] Further, originalism's beginning can be traced back to the fight against *Brown*.[286] It was, in some respects, an interpretive method created to rationalize segregation. Without living constitutionalism, there is no *Brown*.[287] There is no equal right to have a vote counted.[288] The Founders did not have the same conception of privacy rights.[289] There is certainly no exclusionary rule; the Founders ignored such a formulation.[290] Americans of different racial and ethnic backgrounds would not have the fundamental right to marry each other; the Founders would have recoiled at the suggestion.[291] Without living constitutionalism, it would be hard to justify banning the death penalty for minors based on original intent. Minors were executed in the Founding Era.[292] Our society changes. Justice Thurgood Marshall, speaking against originalism, wrote, "we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective."[293]

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282 *See* Klarman, *supra* note 47, at 1881–82. *But see* Amar, *supra* note 168, at 674–75.

283 Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

284 *See id.* at 492–93.

285 *See* Klarman, *supra* note 239, at 1881 ("If 'original understanding' is taken to mean the Framers' specific intentions with regard to the practice of school segregation, the overwhelming consensus among legal academics has been that *Brown* cannot be defended on originalist grounds.") (citations omitted); Marshall, *supra* note 158, at 1262 (writing that the consensus among legal experts is that originalist attempts to justify *Brown* have not succeeded).

286 *See* TerBeek, *supra* note 82, at 1 ("[O]riginalism grew directly out of political resistance to *Brown v. Board of Education* by conservative governing elites, intellectuals, and activists in the 1950s and 1960s.").

287 *See* Ronald Turner, *Justice Antonin Scalia's Flawed Originalist Justification for* Brown v. Board of Education, 9 WASH. U. JURIS. REV. 179, 218 (2017) ("[Scalia's and Bryan Garner's] readings of the texts of the Thirteenth and Fourteenth Amendments as prohibiting all white-supremacist and separationist laws is atextual, acontextual, and ahistorical . . . .").

288 *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV., 1921, 1927–29 (2018) (describing that since the Founding Era states have been free to choose from a number of differing apportionment systems, many of which did not abide by modern one person, one vote standard).

289 *See* Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828 (1986) ("By choosing that level of abstraction [in *Griswold*], the Bill of Rights was expanded beyond the known intentions of the Framers.").

290 *See* SUTTON, *supra* note 212, at 67–68.

291 *See* William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81, 84 (1972).

292 *See* Jennifer Seibring Marcotte, *Death Penalty for Minors: Who Should Decide?*, 20 S. ILL. U.L.J. 621, 623 (1996) ("The application of the death penalty to individuals who were under the age of eighteen when they committed their crimes has historically been acceptable.").

293 Marshall, *supra* note 13.

Without living constitutionalism, there is no Justice Marshall. He reflected that "[t]he men who gathered in Philadelphia in 1787 . . . could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."[294] The Founding Fathers—and largely the Fourteenth Amendment writers—thought that having Justice Marshall at school, the counter, or the Court would challenge white supremacy.[295] For some, living constitutionalism is an intellectual exercise, playful banter between elite lawyers as to the role of the Founding Fathers. To Justice Marshall and many more, living constitutionalism was about constitutional freedom.

This Article has alluded to the necessity of judicial review to protect civil rights; it is highly unlikely that the legislature would have been able to end legal segregation in the 1950s.[296] Suppose, however, that this view is incorrect and the Warren Court did not need to adopt living constitutionalism as a tool for judicial review because the legislature would have ended segregation by itself.[297] In this scenario, living constitutionalism is still an important component of desegregation (or whichever issue Congress is addressing as opposed to the Court). When Congress understands that segregation is antithetical to our constitutional and social order, adopts that purpose of the Fourteenth Amendment and applies it to modern contexts, and inextricably ties a legislative remedy to a constitutional right, Congress is doing living constitutionalism. And remember, one of the major premises of the Warren Court's living constitutionalism is that the Court is not the only body that interprets the Constitution. This constant ratification of our governing principles among the populace has been occurring for a long time,[298] and it has been a critical force in recognizing the rights and dignity of all Americans.

CONCLUSION

The Warren Court utilized living constitutionalism in many important cases. Out of these cases arose living constitutionalist themes and tenets which suggest a

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294 *Id.*

295 *Id.*; Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69, HARV. L. REV. 1, 62 (1955); STONE & STRAUSS, *supra* note 76, at 21–22.

296 *See, e.g.*, FINLEY, *supra* note 32 ("[I]n practice, segregation would continue quite some time.").

297 To see why the legislature may not have acted in the absence of *Brown*, see generally KLARMAN, *supra* note 19. It should be acknowledged, however, that at various points the roles have been reversed. The *Civil Rights Cases* of 1983 mark a time when Congress attempted to pass legislation and the Court struck the law down. *See* Engelman Lado, *supra* note 30; Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Revolution*, 131 YALE L.J. (forthcoming 2022).

298 *See* Brennan, *supra* note 91, at 438 (outlining his understanding of contemporary ratification); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 959–60 (2004) (writing that popular constitutionalism has a long and storied history); *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (addressing the countermajoritarian difficulty through a theory of constitutional moments that can change our understanding of the Constitution outside of the formal amendment process). *But see* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 759–60 (1992) (critiquing Professor Ackerman's conception of constitutional moments).

cohesive interpretive theory of the Constitution. The Warren Court's theory of living constitutionalism is just as much a theory of interpretation as originalism; in fact, it should be preferred. This is not to say that the Warren Court's living constitutionalism should be applied today in full. It should be understood as complementing modern legal movements. The living constitutionalism of the twenty-first century will, by definition, look different than it did in the 1960s; the justices were products of their era and often moved slowly, or incorrectly, on a variety of issues. However, without the tenets of the Warren Court's living constitutionalism, our society would be far more cruel, apathetic, and unjust. Justice Scalia believed that you cannot beat something with nothing. Living constitutionalism is a powerful something.